



# CITY OF LODI

## COUNCIL COMMUNICATION

AGENDA TITLE: Confidentiality Agreement between Enron Capital & Trade Resources Corp. and Enron Power Marketing, Inc. and City of Lodi

MEETING DATE: May 7, 1997

SUBMITTED BY: Electric Utility Director

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RECOMMENDED ACTION: That the City Council adopt the attached resolution authorizing the Mayor to enter into a confidentiality agreement with Enron Capital & Trade Resources Corp. And Enron Marketing, Inc. (Enron).

BACKGROUND: The attached agreement is part of the ongoing efforts of the Northern California Power Agency (NCPA) to reach an alliance agreement with Enron. Enron has requested we enter into this confidentiality agreement which is similar to those which have already been entered into between Enron and the Utility Directors and NCPA.

FUNDING: N/A

Alan N. Vallow  
Electric Utility Director

Prepared by Sondra Huff, Electric Utility Management Administrator

ANV/SH

cc: City Attorney  
Director, Business Planning & Marketing, J. Stone

APPROVED

  
H. Dixon Flynn  
CITY MANAGER

**Confidentiality Agreement ("Agreement") between Enron  
Capital & Trade Resources Corp. and Enron Power Marketing,  
Inc. (collectively, "ECT") and City of Lodi ("Lodi")**

In connection with the Alliance Agreement between ECT and Northern California Power Agency ("NCPA") dated January 14, 1997 (the "Alliance Agreement"), the negotiation of definitive agreements and the transactions that are proposed thereunder (the "Proposed Transaction"), Lodi and ECT are prepared to furnish one another with written data or information (or an oral communication if the Party requesting confidentiality for such oral communication promptly confirms such communication in writing) including, without limitation, proposals, the description of products and services, and marketing and evaluative techniques, which is privileged, confidential or proprietary or which constitutes a trade secret under the Uniform Trade Secrets Act of California (California Civil Code § 3426 *et seq.*) ("Confidential Information"). Notwithstanding the foregoing, the term "Confidential Information" shall not include information which: (i) is a matter of public knowledge at the time of its disclosure or is thereafter published in or otherwise ascertainable from any source available to the public without breach of this Agreement, (ii) constitutes information which is obtained from a third party other than by or as a result of an unauthorized disclosure, or (iii) prior to the time of disclosure had been independently developed by receiving Party not utilizing improper means. As a condition to furnishing Confidential Information, Lodi and ECT each agree to the following:

1. Authorization to Use Confidential Information. Each Party expressly authorizes and grants its consent to the other Party to use, but not disclose, Confidential Information, whether acquired before or after the execution of this Agreement by both parties (the "Effective Date"), pertaining to, without limitation, the Proposed Transaction, for the purpose of evaluating the objectives of the parties under the Alliance Agreement. Each Party agrees that, except in connection with the use of such Confidential Information as permitted hereunder, it shall not disclose Confidential Information, whether acquired before or after the Effective Date, to any third party other than each Party's officers, directors, employees, advisors, lenders, members, representatives or such Party's affiliates, their respective officers, directors, employees, advisors, lenders, members or representatives, who need to know and agree to maintain the confidentiality of the Confidential Information (collectively, "Representatives") by signing a Confidentiality Agreement substantially similar to this Agreement. Each party shall be responsible for any breach of this Agreement by its Representatives.
2. Authorized Disclosure. Notwithstanding anything contained in this Agreement, Confidential Information may be disclosed to any governmental, judicial or regulatory authority requiring such Confidential Information, provided that: (a) such Confidential Information is submitted under applicable provisions of California law (including, but not limited to California Government Code §§ 6254(e), 6254(k) and 6254.7(d)) for confidential treatment by such governmental, judicial or regulatory authority; (b) prior to such disclosure, the Party who supplied the Confidential Information is given notice of any disclosure requirement so that it may take whatever action it deems appropriate, including

intervention in any proceeding and the seeking of an injunction to prohibit such disclosure (California Government Code § 6255); and (c) the Party subject to the governmental, judicial or regulatory authority endeavors to protect the confidentiality of any Confidential Information to the extent reasonable under the circumstances and to use its good faith efforts to prevent the further disclosure of any Confidential Information provided to any governmental, judicial or regulatory authority (California Government Code § 6259(c)). If the Party is obligated or is advised of the obligation to disclose any public documents containing Confidential Information, the Party, to the extent legally permitted, shall first obtain from the other Party a "Public Disclosure Copy" in which the Confidential Information has been redacted.

3. Return of Confidential Information. At any time, either Party may request that the other Party return or destroy all written Confidential Information (including written confirmation of oral communications) provided by the requesting Party within three (3) years following the Termination Date. In the event of such request, all such documents, analyses, compilations, studies or other materials prepared by the returning Party or its Representatives that contain or reflect Confidential Information shall, at the option of the returning Party, within a reasonable time after such request, be either delivered to the requesting Party or destroyed and no copy thereof shall be retained (any such destruction to be confirmed in writing by a duly authorized officer of the returning Party). Notwithstanding the foregoing, however, computer archival and backup tapes and archival and backup files may, at the option of the returning Party, be either retained as confidential or destroyed. The provisions of this Section 3 shall not restrict a Party from (a) maintaining its own tax, accounting and regulatory reporting documents containing Confidential Information; or (b) retaining any Confidential Information that is the subject of a dispute or necessary for the prosecution or defense of such disputes.
4. No Representation or Warranty. Although a party furnishing information, including Confidential Information, has endeavored to include materials which the furnishing party believes to be reliable and relevant for the receiving party's evaluation, the furnishing party makes no representation or warranty as to the accuracy or completeness of any such provided information. Furthermore, neither the furnishing party nor its Representatives shall have any liability to either the receiving party or its Representatives resulting from the use of any such information by the receiving party or its Representatives.
5. Right to Remedies. A party shall be liable for any breach of this Agreement by such party or any of its Representatives. Any action for damages shall not be a sufficient remedy for any breach hereof and therefore, the non-breaching party shall, in addition to any other available legal or equitable remedies, be entitled to specific performance and an injunction against such breach. Such remedy shall not be deemed to be the exclusive remedy available to the non-breaching party, but shall be in addition to all other available remedies. Neither failure nor delay by the non-defaulting party in exercising any of its rights, powers or privileges herein shall operate as a waiver nor shall any single or partial exercise preclude any other or further exercise of any right, power or privilege.

6. Uniform Trade Secrets Act of California. The rights of the Parties under this Agreement are in addition to and not in lieu of their rights under California law, including, but not limited to, the Uniform Trade Secrets Act of California (California Civil Code § 3426 *et seq.*) and the California Public Records Act (California Government Code § 6250 *et seq.*). Nothing in this Agreement shall be construed as a waiver on the part of any Party of any privilege or objection of any kind to the disclosure or use of Confidential Information.
7. No Partnership. Neither this Agreement nor any communications of the parties shall be deemed to create any obligation or liability for either party to proceed with the Proposed Transaction unless and until the parties so agree in writing. This Agreement neither obligates a party to deal exclusively with the other party nor prevents a party or any of its affiliates from competing with the other party or any of its affiliates, so long as such party does not breach this Agreement. The parties agree that no joint venture, partnership, or other fiduciary relationship shall be deemed to exist or arise with respect to the Proposed Transaction.
8. Binding Effect. This Agreement shall be binding upon and for the benefit of ECT and Lodi and their respective Representatives, successors, and permitted assigns. Neither ECT nor Lodi may assign its rights or obligations hereunder without the prior written consent of the other party.
9. Choice of Law. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA WITHOUT REGARD TO CONFLICTS OF LAWS RULES OR PRINCIPLES.
10. Termination. This Agreement shall terminate on the date three (3) years from the Effective Date of this Agreement (the "Termination Date").

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in duplicate originals to be effective as indicated above.

ENRON CAPITAL & TRADE RESOURCES  
CORP.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

ENRON POWER MARKETING, INC.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

AGREED AND ACCEPTED THIS  
\_\_\_\_\_ day of \_\_\_\_\_, 1997.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Approved as to form *Russell A. Hays*  
City Attorney

RESOLUTION NO. 97-56

A RESOLUTION OF THE LODI CITY COUNCIL  
APPROVING THE CONFIDENTIALITY AGREEMENT BETWEEN  
ENRON CAPITAL & TRADE RESOURCES CORP., AND ENRON  
POWER MARKETING, INC. AND CITY OF LODI

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BE IT RESOLVED, that the Lodi City Council hereby authorizes the Mayor to enter into a confidentiality agreement with Enron Capital & Trade Resources Corp., and Enron Marketing, Inc.

Dated: May 7, 1997

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I hereby certify that Resolution No. 97-56 was passed and adopted by the Lodi City Council in a regular meeting held May 7, 1997 by the following vote:

AYES: Council Members -  
NOES: Council Members -  
ABSENT: Council Members -  
ABSTAIN: Council Members -

JENNIFER M. PERRIN  
City Clerk